Defence of Qualified Privilege

This article considers the defence of qualified privilege by comparing its applications in Australian and English common law, under s 30 of the Defamation Act 2005 (NSW) and the new public interest journalism defence added by section 29A of the recent defamation amendments New South Wales and other states.The article indicates that this defence has developed substantially over the time and considers the changes made by ss 29A and 30, as well as the matters raised by the High Court in Lange v ABC.

Introduction

The law of defamation balances the right to reputation against the right to freedom of speech and, in doing so, places inhibitions on both interests. The balance between freedom of speech and protection of reputation is struck by providing several different defences to publishers which enable them to escape liability for damaging a person's reputation. Defamation law provides a "qualified" privilege to publish defamatory statements for the "common convenience and welfare of society"[1]. It is referred to as "qualified" because it is only protected if the publisher is not actuated by malice and does not use the occasion for an improper purpose. Species of this privilege exist at the common law and under statute.

This article considers both the statutory and common law defences of qualified privilege including "*Lange*" qualified privilege and statutory defence of qualified privilege and concepts of public interest and responsible journalism.

The emergence of the defence of qualified privilege

English common law courts developed the concept of qualified privilege because of their view that such a defence was necessary for the "common convenience and welfare of society" and public policy[2]. It overcame a plaintiff`s right to protect his or her reputation in certain circumstances where considerations of the welfare of society and "greater public interests and

[1] *Stuart v Bell* [1891] 2 QB 341 at 346 per Lindley LJ; *Macintosh v Dunn* [1908] AC 390 at 399 (PC).

[2] *London Association for Protection of Trade v Greenlands Ltd* [1916] 2 AC 15 at 28 per Earl Loreburn. See Patrick George, 'Qualified privilege — A defence too qualified?' (2007) 30 *Australian Bar Review Journal* 46.

social goods"[3] made it necessary that defamatory and possibly untrue material nevertheless be published.[4] The first signs of the common law defence of qualified privilege appear in *Edmondson v Stephenson*[5] concerning the provision of character references for servants.[6]

Initially, this defence was limited to private statements which were not intended for public dissemination or statements made in response to provocation by the plaintiff.[7]The general principle of the common law defence of qualified privilege was expressed in *Toogood v Spyring*[8] in which Parke B stated:

> "In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits."[9]

This statement of Parke B was refined over the years and stands as the "locus classicus" of the common law defence of qualified privilege.[10]

[3] Dr David Rolph, *Defamation Law*, (Lawbook CO, 2016) 218.

[4] Patrick George, 'Qualified privilege — A defence too qualified?' (2007) 30 *Australian Bar Review* 48.

[5] (1766) 1 Bull NP3 at 8.

[6] Patrick George, 'Qualified privilege — A defence too qualified?' (2007) 30 *Australian Bar Review* 48.

[7] R H Helmholz, *The Oxford History of Laws of England*, (The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s), Vol 1, Oxford University Press, Oxford, 2004, pp 579–81.

[8] (1834) 1 CrM&R 181 at 193; 149 ER 1044 at 1049–50.

[9] (1834) 1 CrM&R 181 at 193; 149 ER 1044 at 1044–5.

[10] *Stuart v Bell* [1891] 2QB341 at 346 per Lindley LJ, *Mcintosh v Dunn* [1908] AC 390 at 399 (PC); *London Association for Protection of Trade v Greenlands Ltd* [1916] 2 AC 15 at 22 per Lord Buckmaster LC.

Simpson J in *Megna v Marshall*[11] concluded that the process of "the determination of a defence of qualified privilege at common law involves three strands of inquiry"[12] which are as follows:

i. "identification of an **occasion** of qualified privilege by reference to all of the circumstances in which the communication is published, including, particularly, the subject matter of the communication: this involves the identification of a duty or interest in the publisher to communicate with respect to that subject matter, and the identification of a reciprocal interest in the recipient in receiving a communication with respect to that subject matter;

ii. Determination whether the content of the communication was **relevant**, **germane**, or **sufficiently connected** to that occasion or subject matter;

iii. (only if both occasion and relevance are established), determination whether, notwithstanding that there is an occasion of qualified privilege, and that the communication is sufficiently relevant or germane to that occasion, the occasion was misused, or used for an ulterior or extraneous purpose, such as to give rise to a finding that the publisher was actuated by express malice."[13]

Her Honour further opined that the close analysis of the key authorities indicated that "the proper process for determining a defence of qualified privilege" involved asking a series of questions."[14]

In a nutshell, that proper process is to ask, first, the question whether the circumstances in which the publication was made including subject matter and the identity of the recipient and the publisher give rise to the reciprocity of duty or interest between the publisher and the recipients, therefore, create a privileged occasion?[15]

---

[11] [2010] NSWSC 686.

[12] *Megna v Marshall* [2010] NSWSC 686 at 50.

[13] *Megna v Marshall* [2010] NSWSC 686 at 50.

[14] *Megna v Marshall* [2010] NSWSC 686 at 175.

[15] *Moit v Bristow* [2005] NSWCA 322; *Baird v Wallace-James* (1916) 85 LJPC 193 at 198.

Her Honour stated that if the answer to this question is in the affirmative the next question is whether the defamatory statements are *sufficiently relevant*[16], *germane* or they *have sufficient connection*[17] to the occasion? If the answer is in the negative, there would be no defence of qualified privilege and, if the answer is the affirmative, the question is whether the publisher was actuated by malice in publishing the defamatory statements, the burden of proof of which is on the plaintiff.

Privileged occasion

The common law defence of qualified privilege requires a privileged occasion which arises from a reciprocity of duty and interest between the publisher and its recipients. It is said that the reciprocity of duty or interest is essential in establishing a privileged occasion. The onus of proof lies with the defendant to establish the existence of the privileged occasion at the time of the publication.

There are some established categories where the law will recognise occasions of qualified privilege, but they are not exhaustive as they are difficult to identify and cannot be catalogued comprehensively.

The common law recognises that communications are protected where a person has an interest or a duty, legal, social, or moral, to make a statement on an occasion and the recipient of the statement has a corresponding interest or duty to receive it. The publisher must prove that he or she published the defamatory matter in discharge of a duty or protecting own self-interest or the interests of others. The duty could be a legal, moral, or social one, but the concept of moral and social duties is broad and involves questions of community standards if there is no evidence before the court. In circumstances in which the defendant seeks to argue that he or she published the defamatory matter to protect interests of others they must prove that they were under a legal, moral, or legal duty to do so.

[16] *Adam v Ward* [1917] AC 309, *Braddock v Bevins* , *Mowlds v Fergusson* , *Bellino* ; contra *Horrocks v Lowe* [1975] AC 135.

[17] *Bashford v Information Australia* (2004) 218 CLR 366.

All the circumstances of a case must be examined closely by the court in determining existence of a privileged occasion. The relevant factors to be considered were formulated by Earl Loreburn in *Baird v Wallace-James*:

> "In considering the question whether the occasion was an occasion of privilege the Court will regard the alleged libel and will examine by whom it was published, to whom it was published, when, why, and in what circumstances it was published, and will see whether these things establish a relation between the parties which gives a social or moral right or duty."

It is helpful to distinguish between circumstances where there is an existing and established relationship between the publisher and recipients and cases where there is no such relationship as the law attaches privilege more readily to publications within an existing relationship than those between strangers.[18]

A privileged occasion can also arise where the publisher voluntarily publishes defamatory information. In *Bashford v information Australia*, the High Court held that an occasion of privilege existed between the defendant and its fee-paying subscribers for a bulletin on issues on health and safety in the workplace. The Court stated that the fact the information was volunteered to paid subscribers did not bar the claim of qualified privilege. The Court held the subscribers were only those responsible for occupational health and safety issues which was the subject matter of the defamatory information, therefore, there was reciprocity of duty and interest between the defendant and the recipients. However, McHugh J in his dissenting judgment stated that where a defendant volunteered defamatory information, a privileged occasion would only arise if there were a "pressing need". His Honour took the view that the common convenience and welfare of society could not be served by voluntary provision of the defamatory information itself. McHugh J's dissenting judgment was applied by New South Wales courts in some cases but, the High Court in *Papaconstuntinos v Holmes a Court* held that there was no requirement for defendants to establish a pressing need where they published defamatory information to protect their own interest.

In *Gutnick v Dow Jones & Company Inc* (No 4), Dow Jones was unsuccessful in pleading in common law qualified privilege on the basis that its publications on the internet and in print were only available to subscribers on specialist news and services. The Court distinguished the

[18] *Kearnes v General Council of the Bar* [2003] 2 All ER 534at 547.

decision in *Bashford* on the basis that it involved a narrow subject matter and a limited recipients compared with circumstances in which the publication was made to broad classes of recipients with an interest in receiving it.

Relevance to the occasion

It is suggested that "no narrow view should be taken of the pursuit of duty or interest in what was said" on an occasion of privilege. There must be a real and direct connection between the privileged occasion and the defamatory matter and the nature of connection is of relevance. The relevance test was formulated by Sheller JA in *Bashford v Information Australia (Newsletters) Pty Ltd*as "whether the relevant sting(s) was germane and reasonably appropriate to the occasion". It was also held in *Marshall v Megna* that the defamatory statements must have a sufficient connection to the privileged occasion to establish the defence.[19] The Defamatory statements are privileged "if they are relevant to the duty sought to be discharged or the interest sought to be protected".

The privileged occasion can be lost if the publication includes extraneous, irrelevant or marginal and gratuitous imputations that harm the reputation of the plaintiff. The publication of such matters could establish evidence of malice.

In *Laughton v Sodor and Man*, however, the Privy Council held: "To submit the language of privileged communications to a strict scrutiny, and to hold all excess beyond the absolute exigency of the occasion to be evidence of malice, would in effect greatly limit, if not altogether defeat, the protection which the law throws over privileged communications."

Reply to attack

Another common occasion of privilege is where the publisher is responding to an attack made on his/her conduct or actions. At common law a person whose reputation is publicly attacked is entitled to the right of reply to that attack. The reply to attack is treated as an occasion of privilege.

---

[19] [2013] NSWCA 30 (at [198] per Beazley JA with whom Allsop P and Hoeben JA agreed).

Relevantly, Starke J in *Penton v Calwell* held:

> "Great latitude must be allowed to a person defending himself, his interests and rights against attacks and accusations made against him, and, however violent or strong his language may be, still it is for the jury to determine whether he could not honestly and reasonably have believed to be necessary for the vindication of himself, his rights and interests: See *Gray v Society for Prevention of Cruelty to Animals* (1890) 17 Rettie 1185; *Spill v Maule* (1869) LR 4 Ex 232…The language in which defamatory accusations are repelled must not be scrutinized too critically, for the party vindicating his character has a privilege to publish matter of vindication and defence and matters not irrelevant for that purpose. And it is for the jury to determine whether or not the privilege of the occasion has been abused."

However, the scope of this right is not absolute and "the response to attack must be commensurate with, relevant to and sufficiently connected with the attack".[20] The High Court in *Harbour Radio Pty Ltd v Trad*[21] held that the reply to attack qualified privilege relied on three key factors. In essence, the test to be applied is:

i. The existence of a duty or interest to reply in the case of an attack. The reciprocity of duty and interest between the publishers and the recipients;
ii. In order to determine as to whether there is sufficient connection between the response and attack it is necessary to consider the content of the attack, the credibility of the attack and the attacker. It is necessary to consider the content of attack and whether the matter is directed to the attacker or the attack;
iii. The response must be proportionate with the attack. (It is useful to note that Kiefel J expressed the view that the proportionality of the response goes to the issue of malice not the issue of relevance); and
iv. The response must be made bona fide for the purpose of vindication and not actuated by malice.

Malice

The publisher`s motive in publishing the defamatory material is crucial and the defence of qualified privilege both at common law and in statute will be defeated if the plaintiff proves

---

[20] *Harbour Radio Pty Ltd v Trad* [2012] HCA 44 at 46 (CLR); *Panton v Calwell* (1945) 70 CLR 219 at 233.

[21] [2012] HCA 44.

that the defendant was actuated by malice.[22] Malice is a serious matter and the plaintiff must demonstrate that the defendant published the defamatory matter for an ulterior purpose other than the purpose for which the privileged occasion exists or was actuated by some improper motive.[23]

However, it is significantly difficult to deal with the issue of malice due to its imprecise concept.[24] Wolff CJ in *Leutich v Walton*[25]stated that malice is an ambiguous term, in colloquial form means spite or ill-will but in law as well as that meaning has several meanings and a wrongful act done intentionally is one of them.

It is said that matters relevant to malice must be distinguished from matters related to exceeding the privileged occasion.[26] Malice must be established by evidence not by mere conjecture.[27] It is essential to consider the nature and the extent of the duty or interest before addressing the issue of malice.[28] The High Court in *Roberts v Bass*[29] at [75] held that:

> "An occasion of qualified privilege must not be used for a purpose or motive foreign to the duty or interest that protects the making of the statement. A purpose or motive that is foreign to the occasion and actuates the making of the statement is called express malice. The term "express malice" is used in contrast to presumed or implied malice that at common law arises on proof of a false and defamatory statement. Proof of express malice destroys qualified privilege. Accordingly, for the purpose of that privilege, express malice (malice) is any improper motive or purpose that induces the defendant to use the occasion of qualified privilege to defame the plaintiff."

---

[22] *Horrocks v Lowe* [1975] AC 135 at 149 as per Lord Diplock.

[23] *Barbaro v Amalgamated Television Services Pty Ltd* (1985) 1 NSWLR 30 at 50-1; *Lindholdt v Hyer* (2008) 251 ALR 514.

[24] Dr David Rolph, *Defamation Law*, (Lawbook CO, 2016) 231.

[25] [1960] WAR 109 at 112.

[26] *London Association for Protection of Trade v Greenlands Ltd* [1916] 2 AC 15 at 23.

[27] *Barbaro v Amalgamated Television Services Pty Ltd* (1985) 1 NSWLR 30 at 51 as per Hunt J.

[28] *Cush v Dillon* (2011) 243 CLR 298; [2011] HCA 30 at 306 (CLR) per French CJ, Crennan, Bell and Kiefel JJ.

[29] (2002)212 CLR 1; [2002] HCA 57.

Therefore, the Court held that while knowledge of falsity was relevant to determining malice the actual test was impropriety of purpose, not knowledge of falsity.[30] It is insufficient to prove ill-will, prejudice, bias, recklessness or lack of belief in truth to establish malice. [31] Further, the defendant's lack of honest belief in the truth of the defamatory publication must not be equated with malice."[32]

Implied freedom of political speech and Lange qualified privilege

In Australia, freedom to disseminate and receive information on government and political matters is regarded as vital to the proper functioning of Parliamentary democracy.[33]
The common law defence of qualified privilege provides protection to particular occasions where the relationship between the publisher and recipients of defamatory information necessitates its publication. However, the privilege is lost if the occasions is used for some ulterior or improper purpose[34] or is exceeded by "going beyond the limits of the duty and interest"[35].

Historically, the common law defence of qualified privilege did not protect media defendants for defamatory publications to the world at large. This was because the reciprocity of duty and interest which is the essential requirement in establishing a privileged occasion[36] is usually absent in relation to such publications.[37] However, the High Court has extended and modified the common law defence in certain circumstances where issues of public interest and welfare of society require widely disseminated defamatory publications. [38] The High Court in

---

30 (2002)212 CLR 1; [2002] HCA 57 at 32-33.

31 *Roberts v Bass* (2002) 212 CLR 1, esp. per Gaudron, McHugh and Gummow JJ at [74] – [104]; *Fraser v Holmes* [2009] NSWCA 36 at [50] – [68] per Tobias JA with whom McColl and Basten JJA agreed; *Cush v Dillon* (2011) 243 CLR 298 at [27].

32 *Adam v Ward* [1917] AC 309 at 334 as per Lord Atkinson; *Roberts v Bass* (2002) 212 CLR 1.

33 *Lange v Australian Broadcasting Corporation* 189 CLR 520.

34 Dr David Rolph, *Defamation Law*, (Lawbook CO, 2016) 220.

35 *Watt v Longsdon* (1930) 1 KB 130 at 142.

36 *Adam v Ward* [1917] AC 309 at 334 as per Lord Atkinson.

37 *Aktas v Westpac banking Corporation* (2010) 241 CLR 79.

38 *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at 195; *Lange v Australian Broadcasting Corporation* 189 CLR 520.

Nationwide News Pty Ltd v Wills [39] and *Australian Capital Television Pty Ltd v Commonwealth* [40] (the freedom of speech cases) held that an implication of freedom of political communication arose from the language and structure of the Commonwealth Constitution and the concept of responsible government.[41] The Court further ruled that certain federal legislation were invalid and eroded the implied freedom of political communication.[42]

In 1994, following the decisions of cases *Theophanous v Herald & Weekly Times Ltd*[43] (*Theophanous*) and *Stephens v West Australian Newspapers Ltd* [44] (*Stephens*) based on the implied freedom recognised in the freedom of speech cases, the scope of the common law defence of qualified privilege was extended to publications on government and political matters. The High Court in *Theophanous* held that defamation law on all federal, State and Territory level and common law was subject to the implied freedom of speech arising from the Commonwealth Constitution.[45] Therefore, *Theophanous* defence was established to protect defamatory publications on government and political issues.

This defence was still subject to the proviso of the reciprocity of interest-duty between the publisher and its recipients and lost if the plaintiff could prove that the publication was actuated by malice.[46] However, it substantially widened the scope of the common law qualified privilege for widely disseminated defamatory publications. [47] However, the High Court took a

---

[39] (1992) 177 CLR 1; 108 ALR 681.

[40] (1992) 177 CLR 106; 108 ALR 577.

[41] Sally Walker' '*Lange v ABC*: the High Court rethinks the "constitutionalisation" of defamation law, (1998) 6 *Torts law Journal* 13.

[42] Sally Walker' '*Lange v ABC*: the High Court rethinks the "constitutionalisation" of defamation law, (1998) 6 *Torts law Journal* 13.

[43] (1994) 182 CLR 104; 124 ALR 1.

[44] (1994) 182 CLR 211; 124 ALR 80.

[45] (1994) 182 CLR 104 at 130,136 and 164-6.

[46] (1994) 182 CLR 104 at 140.

[47] Sally Walker' '*Lange v ABC*: the High Court rethinks the "constitutionalisation" of defamation law, (1998) 6 *Torts law Journal* 12.

different approach in *Lange v Australian Broadcasting Corporation*[48]. The Court in a unanimous decision held that the common law of defamation did not adequately protect freedom of speech on government and political issues, therefore, it needed an extension of the common law qualified privilege in order to contain the concept of implied freedom of political speech.[49] The Court further declared that "each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia."[50] However, because the fact that the publication relates to government or political matters does not confer an immunity from liability to publishers to defame and the protection will only be granted to defendants who could establish that they have acted reasonably.[51]Thus, the Court found that the legislative approach to reasonableness requirement listed in section 22 of the *Defamation At 1974* (NSW) conformed to the constitutional requirements .[52] Therefore, the High Court overruled *Theophanous* and established a narrower duty-interest form of qualified privilege defence which was subject to an additional reasonableness requirement which is known as *Lange* qualified privilege/defence (*Lange* defence). [53] This may be moot since 2005 because at that time all state legislatures adopted the Uniform Defamation Law which contains the section 30 reasonableness requirement. It seems likely that if the issue ever arose again the High Court would find that that provision does not transgress the constitutional freedom.

A publication made to the public on government and political mattes attracts *Lange* defence. This defence is an extension of the common law qualified privilege which applies to publications related to political issues and made to the world at large and could be defeated if the plaintiff proves that the publisher was actuated by malice or ulterior motive.[54]

---

[48] 189 CLR 520.

[49] *Lange v Australian Broadcasting Corporation* 189 CLR 520 at 572. See Dr David Rolph, *Defamation Law*, (Lawbook CO, 2016) 237.

[50] *Lange v Australian Broadcasting Corporation* 189 CLR 520 at 570-1.

[51] Dr David Rolph, *Defamation Law*, (Lawbook CO, 2016) 237.

[52] *Lange v Australian Broadcasting Corporation* 189 CLR 520 at 570-1.

[53] Sally Walker, '*Lange v ABC*: the High Court rethinks the "constitutionalisation" of defamation law' (1998) 6 *Torts law Journal* 17.

[54]Jordan R D Lester, 'Responsible communication on matters of public interest: An analysis of the modification to qualified privilege' (2012) 17 *Media and Arts Law Review* 146.

The *Lange* defence has been "rarely successful"[55] and has failed on at least the following occasions namely: *Herald &Weekly Times Ltd v Popovic*[56] (for publications concerning judges, the Court held that the discussion of judicial officers fell outside of the scope of *Lange* defence in the absence of connection to legislative or executive branches of government.); *John Fairfax Publications v O`Shane*[57], (the Court endorsed the view that publications concerning judicial officers are not protected by *Lange* defence because the judiciary arm of the government is not part of representative government.)[58]. Further, this defence was considered by the House of Lords in *Reynolds v Times Newspapers Ltd* [59] but Lord Nicholls formed the view that it was "unsound in principle to distinguish political discussion from discussion of other matters of serious public concern".[60] His Lordship further stated that the principles of common law qualified privilege enabled the courts to consider the importance of freedom of expression by the mass media on all public interest matters.[61] Therefore, the House of Lords in this case held that the privilege in the law of defamation is founded on public interest and the need for uninhibited communication between particular recipients and publisher in particular circumstances.[62] This was known as "*Reynolds public interest defence*"[63] and used by English courts widely and flexibly.[64] *Reynolds* defence expanded the scope of protection of the common law qualified privilege to widely disseminated publication and was noticeably successful.[65] *Reynolds* defence was abolished upon the passage of *Defamation Act 2013* (UK) (*the UK Act*).[66]

---

[55] Dr David Rolph, *Defamation Law*, (Lawbook CO, 2016) 238.

[56] [2003] VSCA 161.

[57] [2005] NSWCA 164 at 67.

[58] Dr David Rolph, *Defamation Law*, (Lawbook CO, 2016) 238-239.

[59] [2001] 2 AC 127.

[60] [2001] 2 AC 127at 204.

[61] [2001] 2 AC 127 at 204..

[62] *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at 195.

[63] *Jameel v Wallstreet Journal Europe Sprl* [2007] 1 AC 359.

[64] *Jameel v Wallstreet Journal Europe Sprl* [2007] 1 AC 359.

[65] *Bonnick v Morris* [2003] 1 AC 300; *Flood v Times Newspapers Ltd* [2012]2 AC 273; *Grant v Torstar Corporation* [2009] 3 SR 640 at 684-94.

[66] *Defamation Act 2013* (UK) s 4.

Statutory defence of qualified privilege

It is said that the statutory defence of qualified privilege was introduced in New South Wales to address the limitations of this defence in common law in respect of widespread publications.[67]

The following four questions must be asked when determining this defence:

1. Did the recipients have an interest or apparent interest in having the information contained in the matter complained of? [68]
2. If so, was the matter complained of published to the recipients in furtherance of this interest or apparent interest? [69] (The recipient has an apparent interest in having information on some subject if, and only if, at the time of the publication in question, the defendant believes on reasonable grounds that the recipient has that interest.) [70]
3. Was the defendant's conduct reasonable in the circumstances, taking into account the matters in section 30(3) of the Act?[71]
4. In publishing the matter complained of, was the defendant actuated by malice towards the plaintiffs? [72]

In assessing the reasonableness of the defendant`s conduct, the court may consider range of factors to the extent the court thinks they are applicable in the circumstances of the case. Those factors include[73]:

a. the seriousness of any defamatory imputation carried by the matter published;
b. the extent to which the matter published distinguishes between suspicions, allegations and proven facts;

---

[67] *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749.

[68] *Defamation Act 2005* (NSW) s 30(1)(a).

[69] Defamation Act 2005 (NSW) s 30(1)(b).

[70] Defamation Act 2005 (NSW) s 30(2).

[71] Defamation Act 2005 (NSW) s 30(1)(c).

[72] Defamation Act 2005 (NSW) s 30(4).

[73] Defamation Act 2005 (NSW) s 30(3)(a)-(e).

c. the nature of the business environment in which the defendant operates;
d. whether it was appropriate in the circumstances for the matter to be published expeditiously; and
e. any other steps taken to verify the information in the matter published.

This defence is not defeated merely because the defamatory matter was published for reward.[74] It is suggested that the proper approach to the reasonable test is:

> "The question of reasonableness must be tested as between the publisher and the person defamed, not as between the relevant employees and the publisher. The publisher must prove that it acted reasonably in relation to the person defamed despite publishing false and defamatory matter about him. A publisher who publishes serious allegations as fact without having checked with the person concerned is taking the risk that they cannot be justified. In that event, outside the limits of reasonableness, it is the publisher who bears the risk, not the person defamed."[75]

The concept of interest is to be construed in the broader sense of a matter of substance in which the public have an interest in knowing but the interest must be founded in some legitimate concern, not mere prurience[76], mere curiosity[77], titillation[78] or of a salacious nature[79].
Hunt J in *Barbaro v Amalgamated Television Services Pty Ltd*[80] said:

> "The interest or apparent interest of the recipients need not be a proprietary one, nor even a pecuniary one. The word 'interest' is not used in any technical sense; it is used in the broadest popular sense, to connote that the interest in knowing a particular fact is not simply a matter of curiosity, but a matter of substance apart from its mere quality as news. The interest must be definite; it may be direct or indirect, but it must not be vague or insubstantial- so long as the

---

[74] *Defamation Act 2005* (NSW) s 30(5).

[75] *John Fairfax Publications Pty Ltd v Zunter* [2006] NSWCA 227 at 30 per Hanley J.

[76] *Doe v Dowling* [2017] NSWSC 1793 (19 December 2017).

[77] *Barbaro v Amalgamated Television Services Pty Ltd* at 40.

[78] *Wright v Australian Broadcasting Commission* [1977] 1 NSWLR 697 at 711.

[79] *Green v Schneller* (2000) Aust Torts Reports 81-568; [2000] NSWSC 548 at 63,904 (Aust Torts Reports) per Simpson J.

[80] (1985) 1 NSWLR 30.

interest is of so tangible a nature that it is expedient to protect it for the common convenience and welfare of society, it will come within the privilege afforded by the section."

There must be a nexus between the giving of the information on a subject of interest or apparent interest and the defamatory publication.[81] The defendant bears the onus of proof to establish that his/her conduct was reasonable in circumstances of the publication. [82]

The defendant needs to adduce evidence of matters ulterior to publications in order to avoid liability for defamation [83]. It is unreasonable for the defendant to publish beliefs and rumours or speculations[84] or to draw illogical and irrational inferences which are based on no evidence.[85]

Prior to the 2020 amendments, the issue of reasonableness was to be determined by the judge.[86] Hunt J in *Morgan v John Fairfax Media & Sons Ltd*[87] stated that the more serious the allegation made about the plaintiff the greater care prior to publication is expected form the defendant.

It is suggested that the defendant`s reasonable conduct could not be determined solely, or even mainly by those commercial interests.[88] The defendant's honest belief in the truth of what was published is relevant to the reasonableness of the defendant`s conduct.[89]However, it is possible in some circumstances for the defendant to establish reasonableness without the need to establish his or her honest belief in what he or she published.[90] Checking with the source may furnish evidence of reasonableness but is not conclusive.[91]

---

[81] *Wright v Australian Broadcasting Commission* [1977] 1 NSWLR 697 at 711-12.

[82] *Wright v Australian Broadcasting Commission* [1977] 1 NSWLR 697 at 711-12.

[83] I *Wright v Australian Broadcasting Commission* [1977] 1 NSWLR 697 at 700-1.

[84] *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749 at 797.

[85] *Wright v Australian Broadcasting Commission* [1977] 1 NSWLR 697 at 706.

[86] *Davis v Nationwide News Pty Ltd* (2008) 71 NSWLR 606.

[87](1991) 23 NSWLR 374.

[88] *Roger and Nationwide News Pty Ltd* (2003) 216 CLR 327.

[89] *Austin v Mirror Newspapers Ltd* (1985) 3 NSWLR 354 at 363 (PC).

[90] *Barbaro v Amalgamated Television Services Pty Ltd* at 500-1.

[91] *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749 at 800.

Section 29A and public interest

New Section 29A (from July 2021) introduces a new public interest defence in NSW Defamation law. The Attorney General Mark Speakman referred to this section as '*one of the most significant reforms*' and it has been suggested that this defence offers a '*new dawn of free speech and public interest journalism'*. Section 29A(1) is in the following terms:

'*It is a defence to the publication of defamatory matter if the defendant proves that –*

(a) the matter concerns an issue of public interest, and (b) the defendant reasonably believed that the publication of the matter was in the public interest.'

Sections 29A(2) and 29A(3) respectively provide that all the circumstances of the case must be taken into account by a court when establishing this defence and the court may take into account any of the nine factors categorised if it considers applicable to the circumstances of the case. Further, section 29A(4) states that s29A(3)does not require each factor to be taken into account or limit the matters that the court may take into account. Finally, section 29A(5) provides that the jury must determine this defence in defamation proceedings tried by jury.

It is essential to consider that prior to the passage of the Uniform Defamation Laws in 2005, Queensland had a defence of *qualified protection-excuse* made in good faith (Sections 16(1)(h) and 17 of *Defamation Act 1889* (Qld)). That defence could be established if the defendant could establish that the publication related to a matter of public interest and was made in good faith to give information to persons with or were believed on reasonable grounds to have an interest in knowing the truth as to make the publication reasonable in the circumstances. Once defendants could prove these elements, the plaintiff had the onus to prove lack of good faith which was extremely difficult to establish.

Additionally, Lord Nicholls in *Reynolds supra* listed 10 non-exhaustive factors to help determine whether the defence was established[92]:

1. "The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true;

[92] [2001] 2 AC 127 at p 205A-C.

2. The nature of the information, and the extent to which the subject-matter is a matter of public concern;
3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories;
4. The steps taken to verify the information;
5. The status of the information. The allegation may have already been the subject of an investigation which commands respect;
6. The urgency of the matter. News is often a perishable commodity.
7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.
8. Whether the article contained the gist of the plaintiff`s side of the story
9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
10. The circumstances of the publication, including the timing."

Therefore, it could be said that Lord Nicholls` factors are now listed in s29A(3) and it could be argued that English authorities could provide guidelines for the application of section 29A defence.

It is also helpful to mention that s 30 (or its predecessor, s 22 of the 1974 Act) has succeeded on at least the following occasions: *Feldman v Polaris Media* (No. 2) [2018] NSWSC 1035; *Griffith v ABC* [2008] NSWSC 764 (Kirby J) (s 22 upheld on appeal even though truth finding overturned [2010] NSWCA 257 – Hodgson, Basten & McClellan JJA); *Field v Nationwide News* [2009] NSWSC 1285 (Johnson J); *Millane v Nationwide News Pty Limited* [2004] NSWSC 853 (Hoeben J); *Seary v Molomby* [1999] NSWSC 981 (Sully J); *Morgan v John Fairfax & Sons Ltd (No 2)* (1991) 23 NSWLR 37 (Matthews J) (overturned on appeal and new trial ordered – but not on reasonableness issue); *Barbaro v Amalgamated Television Services Pty Ltd* (1985) 1 NSWLR 30 (Hunt J).

Additionally, there have been cases that plaintiffs have succeeded against media organisations and been seen to involve a serious breach of the standards of journalism by the courts. Cases

such as *Pedavoli*[93], *Chris Gayle*[94], *Geoffrey Rush*[95], *O'Neill*[96] and *Chau Chak Wing*[97] are a handful of them. For instance, in *Pedavoli* a completely innocent female teacher was accused of having had sex with two Year 12 male students when the journalist in question knew or at least had the means of knowing that it was not the plaintiff but a completely different teacher. Justice Sackville in the Court of Appeal described it as "an abject failure of investigative journalism".

In *Rush*, Wigney J denounced the newspaper of being guilty of a "recklessly irresponsible piece of sensationalist journalism of the worst kind".

Roles of judge and jury

At common law and probably under the New South Wales defamation legislation prior to the recent amendments, the question whether there was an occasion of qualified privilege was determined by the judge not the jury subject to any disputed questions of fact which were required to be determined by the jury. The question of malice was always a matter to be determined by the jury. This position was preserved by the 2005 legislation which included section 22. That provision is in the following terms:

> *(1) This section applies to defamation proceedings that are tried by jury.*
>
> *(2) The jury is to determine whether the defendant has published defamatory matter about the plaintiff and, if so, whether any defence raised by the defendant has been established.*
>
> *(3) If the jury finds that the defendant has published defamatory matter about the plaintiff and that no defence has been established, the judicial officer and not the jury is to determine the amount of damages (if any) that should be awarded to the plaintiff and all unresolved issues of fact and law relating to the determination of that amount.*

---

[93] *Fairfax Media Publications Pty Ltd v Pedavoli* [2015] NSWCA 237.

[94] *Gayle v Fairfax Media Publications Pty Ltd*; *Gayle v The Age Company Pty Ltd*; *Gayle v The Federal Capital Press of Australia Pty Ltd* (No 3) [2018] NSWSC 1932.

[95] *Rush v Nationwide News Pty Ltd* [2018] FCA 357.

[96] *John O'Neill v Fairfax Media Publications Pty Ltd* (No 2) [2019] NSWSC 655.

[97] *Chau v Fairfax Media Publications Pty Ltd* [2019] FCA 185.

(4) If the proceedings relate to more than one cause of action for defamation, the jury must give a single verdict in relation to all causes of action on which the plaintiff relies unless the judicial officer orders otherwise.

(5) Nothing in this section--

(a) affects any law or practice relating to special verdicts, or

(b) requires or permits a jury to determine any issue that, at general law, is an issue to be determined by the judicial officer, or

(c) requires or permits a jury to determine any issue that another provision of this Act requires a judicial officer to determine.

This is now qualified in respect of the new "public interest publication" defence created by section 29A and the section 30 defence. Subsections 29A(5) and 30(6) are in the following terms:

> *"Without affecting the application of section 22 to other defences, the jury (and not the judicial officer) in defamation proceedings tried by jury is to determine whether a defence under this section is established."*

The consequences of this change to the common law defence of qualified privilege is unclear. The apparent meaning of these provisions and in particular section 22 (5) seems to be that while the statutory defences will be determined by the jury, the judge will determine the common law defence. The reason for the distinction is not easy to discern.

Conclusion

The defence of qualified privilege in all its forms common law, section 30 and the new section 29A is a critically important aspect of the law of defamation. It remains to be seen how this defence will develop particularly in relation to the public interest defence created by section 29A. It remains to be seen whether that defence will make a real difference.

Parisa Hart

Barrister-at-Law